

arising out of and in the course of her employment with respondent. Therefore, claimant is not entitled to temporary total disability compensation or medical treatment.

Claimant appeals, arguing that the evidence establishes that she sustained personal injury by repetitive trauma injuries arising out of and in the course of her employment, and that her work activities were the prevailing factor in causing her injuries and need for medical treatment. Therefore, claimant should be granted temporary total disability compensation and medical treatment.

Respondent contends the SALJ's Order should be affirmed.

The issue raised by claimant is: did the SALJ err in "concluding that Claimant has failed to sustain her burden of proof that she suffered personal injury by repetitive injuries arising out of and in the course of her employment with Respondent."

FINDINGS OF FACT

Claimant is alleging injury during her employment with respondent. Claimant's last day of employment with respondent was June 8, 2012. Claimant's job with respondent was as a Certified Medical Assistant (CMA), but she also cooked, and did housekeeping and laundry. Claimant became a full-time employee with respondent on July 27, 2011. Claimant's job required that she regularly lift residents weighing between 170 and 200 pounds.

Claimant claims that during her employment with respondent she suffered personal injury by repetitive trauma from repeatedly lifting patients with a gait belt from a seated position from about 24 inches off the floor. Claimant testified this was hard on her shoulder and arm. Claimant performed her tasks for respondent 36 hours a week, as she worked four 12 hour shifts each week. Claimant testified that, at first, she had burning in her arms and right shoulder and then it progressed to numbness and she would lose grip. She also had constant pain in her neck, specifically the right side of her neck, between the base of her head down her neck and over to her shoulder. Claimant testified that her symptoms progressed for four or five months until she was let go by respondent.

Claimant testified that before she was fired, her shift was changed several times after she complained of hurting. Claimant reported her pain to a supervisor named Nancy Schroeder and mentioned it to Pamela Brush, her supervisor, and Director of Nursing, and to Artis Perret, the owner of Heartland Haven. Claimant reported her pain because she thought she would be able to get treatment, or at least some help with the lifting. She also testified that many of her co-workers were having the same issues because of the nature of the work. Claimant admits to prior problems with her neck, back and shoulder in the early 90's for which she received chiropractic adjustments and a carpal tunnel release in either 1992 or 1994.

During cross-examination, claimant was asked about any personnel difficulties she had while working for respondent. She denied receiving any warnings during that time. However, respondent's exhibits F and G to the preliminary hearing address counseling sessions with claimant about her treatment of and attitude toward respondent's residents. Claimant was warned against unauthorized smoke breaks and leaving the facility without authorization. Additionally, she was told to always use a belt when transferring residents.

Claimant testified that she has been to so many doctors she forgets what she tells each of them. She never specifically reported to respondent that the pain in her neck, shoulder and arm were related to her work. She simply reported that she was hurting in those areas.

When claimant first inquired about medical treatment for her pain, she sent text messages to Pamela Brush, her nursing supervisor. The first messages sent do not indicate a work-related injury. The messages only inquire about a doctor for her arm, shoulder and neck. When she sent a text to Ms. Perret, the response from Ms. Perret asked why claimant was asking. Claimant did not respond to that inquiry. A later text from Ms. Perret indicated she had only witnessed claimant holding her stomach and mentioned claimant's feet.

Ms. Brush testified that on May 29, 2012, claimant came to her stating that she wanted to quit working and was going to give one week's notice. Ms. Brush responded by asking claimant to fill out a resignation form. Ms. Brush was asked by Ms. Perret to write a statement confirming her conversation with claimant at which time claimant indicated she intended to quit her job. This statement is dated June 30, 2012, a month after the conversation between claimant and Ms. Brush.

Ms. Brush testified that she had conversations with Ms. Perret about claimant's attitude at work and regarding issues claimant had with a particular resident. Ms. Brush recalled a conversation between claimant and Ms. Perret, after which claimant left respondent's property and never returned. However, Ms. Brush never actually heard claimant being told she was terminated.

Ms. Brush testified that claimant never reported a specific injury, but frequently complained of general aches and pains to various body parts, including her stomach and feet. Ms. Brush testified that the arm, neck and shoulder pain claimant complained of involved the same complaints as other workers. But claimant never related her pain to her work. Ms. Brush testified that had claimant reported a work injury, she would have been accommodated. However, on cross-examination, Ms. Brush agreed that she and claimant discussed claimant's arm, shoulder and neck symptoms in the context of lifting people over a long period of time while at work for respondent and for other employers.

Ms. Brush testified that it was probably true that claimant's worked caused her to have problems with her arm, shoulder and neck. However, claimant also frequently complained of stomach and foot issues.

By August 2012, claimant was working for the City of Moundridge. This involved picking up trash, sweeping, cleaning offices and bathrooms and also working as a guardian for three to four disabled people, with no cessation of this work after her termination. Claimant currently works for Valley Hope in Moundridge, Kansas. She began working for Valley Hope on April 24, 2013, as a cook. Claimant also works part-time for the City of Moundridge as a janitor in the park shelter. Claimant testified that she hurts while performing these jobs, but she has to work to make a living. Claimant's current employers are aware of her problems.

At the request of her attorney, claimant met with board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., for an examination on July 18, 2012. Dr. Murati was provided medical records from Dr. Ratzlaff dated June 15, 2012. He had no other records from claimant's past treatment history. No radiological films were provided.

Claimant's complaints to Dr. Murati included right shoulder and arm pain, neck pain, right side upper back pain with burning, tingling in right hand, left hand and wrist numbness, right shoulder and neck sensitivity to touch, difficulty driving and with daily activities and that vibrations from a lawnmower make her arms go numb.

Dr. Murati diagnosed claimant with recurrent carpal tunnel syndrome, right ulnar cubital syndrome, and myofascial pain syndrome of the right shoulder girdle extending into the cervical and thoracic paraspinals. He opined that these diagnoses are a direct result from claimant's work-related injuries that occurred each and every working day through June 8, 2012, during claimant's employment with respondent.

Dr. Murati opined that claimant's repetitive trauma sustained while working for respondent is the prevailing factor in the development of her diagnoses. He noted claimant's preexisting carpal tunnel syndrome release in the past but was unaware of any other past physical problems.

At respondent's request, claimant met with board certified internal medicine specialist Chris D. Fevurly, M.D., on August 17, 2012, for an examination. Her complaints included pain in the right shoulder and right upper back, numbness in the right arm and hand, with tingling in the hand and similar problems in the left wrist and hand from overcompensating with the left arm. Medical records available to Dr. Fevurly included those from Dr. Ratzlaff and Dr. Murati. He was also provided the accident report forms from 1991, 1992, 1997 and the mid-1970's when claimant was treated for carpal tunnel syndrome. Notes from Gary Harbin, M.D., indicated right arm pain with possible carpal

tunnel syndrome from possible cervical spondylosis and cervical nerve root irritation. Claimant denied ever being treated by a chiropractor.

Dr. Fevurly's physical examination identified pain in claimant's neck with pulling during active ROM testing. There was tenderness over the occiput and the entire cervical spine. Claimant's upper extremities displayed a full range of motion in the shoulders, elbows, wrists and hands. Pain was reported in all joints at the extreme ranges of motion. No crepitation was noted in the neck.

Dr. Fevurly diagnosed bilateral upper extremity pain, right greater than left, mild bilateral shoulder impingement, right lateral epicondylitis and possible recurrence of CTS on the right side. He felt there might be some mild symptom magnification.

Dr. Fevurly opined claimant's upper extremity pain and numbness is secondary to a combination of degenerative conditions which developed over years of time and are not primarily the result of claimant's work with respondent. The prevailing factor is preexisting degenerative changes in the rotator cuff, the glenohumeral and AC joints, causing shoulder impingement and the degeneration in the extensor forearm muscles at the anastomosis on the lateral epicondyle. Dr. Fevurly acknowledged claimant might experience pain from her work with respondent. But, claimant's overall condition was consistent with predominantly degenerative and age-related conditions, rather than her work-related injuries. In Dr. Fevurly's opinion, the prevailing factor in claimant's conditions is the preexisting degenerative changes in claimant's shoulder and elbow.

By agreement of the parties, claimant was referred to board certified physical medicine and rehabilitation specialist David E. Harris, D.O., for an IME on October 12, 2012. Along with the physical examination of claimant, Dr. Harris was also provided with 256 pages of medical documentation identifying claimant's past medical history. During the examination with Dr. Harris, claimant denied previous physical problems, other than carpal tunnel syndrome in 1992, which had completely resolved.

Claimant's complaints included pain in the cervicospinal junction along her shoulder girdle and right trapezius region, sharp pain, numbness and tingling in the fingers, right elbow pain on the medial epicondylar aspect, and pain in the soft tissue overlying the shoulder and radiating down towards the elbow on the right.² Claimant reported her pain was related to her work lifting patients weighing between 170 to 200 pounds. She denied any specific injury or trauma.³

² P.H. Trans. at 42-46.

³ P.H. Trans., Resp. Ex. 3 at 1-2.

Included in the medical documents was information from Porter Chiropractic where claimant had been treated from November 2007 through November 2010, for cervical and thoracic pain, right shoulder pain and guarding in the trapezius muscles. Medical documents relating to claimant's 1992 carpal tunnel syndrome, including testing and treatment information, were also included in the documents.

During the examination, Dr. Harris noted guarding and symptom magnification. Claimant displayed nearly full range of motion in the shoulders with tenderness to palpation in the shoulder girdle region. Phalen's test was positive bilaterally.

Dr. Harris diagnosed claimant with myofascial pain syndrome in the cervicospinal junction, shoulder impingement syndrome on the right, medial epicondylitis of the right elbow, recurrent carpal tunnel syndrome (CTS) bilaterally and previously diagnosed cervical spondylosis. Treatment recommendations included trigger point injections, muscle relaxer medication, anti-inflammatory medication, physical therapy for her shoulder impairments and medial epicondylitis, subacromial bursa cortisone injections in the shoulders, wrist splints and repeat NCT/EMG testing for claimant's recurrent CTS and a surgical evaluation for the CTS if deemed necessary.

In evaluating the cause and effect questions, Dr. Harris noted the June 6, 2012, diagnosis of medial epicondylitis by Dr. Ratzlaff with no work connection noted. The fact claimant waited until after her job ended to seek treatment caused Dr. Harris to question the cause of her complaints. He was also puzzled by Dr. Murati's lack of elbow pain diagnosis, other than ulnar neuropathy followed one month later by Dr. Fevurly's diagnosis of lateral epicondylitis. He found those followup diagnoses to be inconsistent with his evaluation and findings. He was unable to determine a causative relationship between claimant's work for respondent and his diagnosis of medial epicondylitis.

Dr. Harris' findings of pain in claimant's shoulders and the soft tissues overlying the cervicospinal junction and neck were seen as degenerative and the prevailing factor for those conditions was determined to be the preexisting disease rather than claimant's work. Given the mechanics of claimant's job, he found a possibility of the repetitive strain injury for the CTS, "which may be caused by the repetitive strain of heavy lifting. . . . It is reasonable to believe that Ms. Allenbach's work activities may have contributed to her condition and may more likely than not represent the prevailing factor contributing to this condition."⁴

Medical records from the Hutchinson Clinic indicate claimant experienced problems in 1997 with low back, thoracic spine and periscapular region pain, and in 2001 with right upper extremity pain and pain on the right side of claimant's neck related to her work for MCDS.

⁴ P.H. Trans., Resp. Ex. E at 10.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(e) states:

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

- (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
- (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
- (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
- (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

K.S.A. 2011 Supp. 44-508(f)(1)(2)(A) states:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

- (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
 - (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
 - (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.
- (B) An injury by accident shall be deemed to arise out of employment only if:
- (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
 - (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2011 Supp. 44-508(g) states:

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Claimant alleges a series of repetitive trauma injuries through her last day worked with respondent on June 8, 2012. Dr. Murati determined claimant's complaints were directly related to her work with respondent with her job duties being the prevailing factor leading to the diagnosed conditions. The diametrical opinion of Dr. Fevurly found the prevailing factor to be claimant's preexisting degenerative changes suffered over many years with many different employments. Those opposite opinions led the SALJ to order the IME by Dr. Harris. It also disturbed the SALJ to note neither Dr. Murati nor Dr. Fevurly were provided medical records from claimant's many past medical treatment regimes. Only Dr. Harris was provided with many, if not all, of claimant's past medical records.

During his review of the records, Dr. Harris noted claimant's history of upper extremity, shoulder, neck and back complaints and injuries. Dr. Harris was unable to connect claimant's medial epicondylitis, her shoulder complaints or cervical complaints with her work for respondent. The only possible connection between her work for respondent and her physical complaints centered on claimant's recurrent CTS bilaterally. Even this condition had a tenuous connection with claimant's job duties with respondent. However, Dr. Harris ultimately found the prevailing factor for claimant's ongoing CTS to be the work for respondent.

The undersigned Board Member finds, by the barest of margins, that claimant has satisfied her burden of proving the prevailing factor for her recurrent CTS is her duties with respondent. The Order of the SALJ is reversed on that issue. All other findings from the May 31, 2013, Order are affirmed insofar as they do not contradict the findings and conclusions contained herein.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be modified to find claimant suffered injury by repetitive trauma leading to the recurrent CTS and claimant's work for respondent was the prevailing factor in claimant's current need for medical treatment for that CTS. In all other regards the Order of the SALJ is affirmed insofar as it does not contradict the findings and conclusions contained herein.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Special Administrative Law Judge C. Stanley Nelson dated July 9, 2013, is modified to find claimant's CTS is the result of the repetitive trauma from her job with respondent and those job duties are the prevailing factor in the development of claimant's recurrent CTS. The Order of the SALJ is modified accordingly.

IT IS SO ORDERED.

Dated this _____ day of November, 2013.

HONORABLE GARY M. KORTE
BOARD MEMBER

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⁵ K.S.A. 2012 Supp. 44-534a.